FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 9 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 446

AMBASSADOR, INC., WASHINGTON-ANNAPOLIS HOTEL COMPANY, DAVID A. BAER AND ROBERT O. SCHOLZ, A PARTNERSHIP, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

PARKER MCCOLLESTER,
GEORGE DE FOREST LORD,
JOSEPH W. WYATT,
Counsel for Appellants.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions on which jurisdiction rests	2
The statutes of the United States involved in this suit	3
Dates of decree and petition for appeal	5
Substantial nature of questions involved	7
Oral opinion	10
Conclusion	10
Appendix—Oral opinion of the District Court	11

Table of Cases Cited

Ethyl Gasoline Corporation v. *U. S.*, 309 U. S. 436	3

Statutes Cited

Communications Act of 1934:	
Section 203 (47 Stat. 1070; 47 U. S. C. 203)	2,3,7,8
Section 401(c) (47 U. S. C. 401c)	2,7
Section 401(d) (47 U. S. C. 401d; 48 Stat. 1092)	2
Expediting Act, Section 2, approved February 11, 1903, as amended 32 Stat. 823, 36 Stat. 1167 (15 U. S. C. 29; 49 U. S. C. 45)	3
Judicial Code, Section 238 (1), as amended, 36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345 (1)	3

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23189

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,

Defendants.

STATEMENT AS TO JURISDICTION

(Filed August 2, 1944. Charles E. Stewart, Clerk)

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Ambassador, Inc., Washington-Annapolis Hotel Company, David A. Baer & Robert O. Scholz, Washington Properties, Inc., The Carroll Arms Hotel, Inc., Commodore Hotel Corporation, Hamilton Realty Corporation, Harrington Hotel Company, Inc., Washington Hotel Company, Dodge Hotel Corporation, James S. Gore, Hay Adams Corporation, The Lafayette, Inc., The Lee Sheraton Corporation, Linwood Hotel Corporation, Mayflower Hotel Corporation, New Colonial Hotel, Inc., Lawrence Gassenheimer, Robert D. Blackistone, The Raleigh Hotel Company, Oscar A. de Lima & Edwin A. de Lima, Shoreham Hotel Corporation, Hotel Statler Company, Inc., Twenty-Four Hundred Sixteenth Street,

Inc., Washington Properties, Inc., Texwash Corporation, and The Willard, Inc., defendants in the above entitled cause, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the decree of the District Court.

This is a suit in equity brought in the District Court for the District of Columbia by the United States of America, as complainant, at the instance of the Federal Communications Commission, under the authority of Section 401(c) of the Communications Act of 1934 (47 U. S. C., Sec. 401(c)) to obtain a decree against the defendant telephone companies and defendant hotel companies enjoining alleged violations of Section 203 of said Act (47 U. S. C., Sec. 203). The District Court granted the injunction against the defendant hotel companies in a decree entered the 8th day of June, 1944.

A. Statutory Provisions On Which Jurisdiction Rests

The Statutory provisions that confer jurisdiction upon the Supreme Court to review the decree of the District Court are:

Section 401(d) of the *Communications Act of 1934*, 48 Stat. 1092, 47 U. S. C., Sec. 401(d), which reads as follows:

> "The provisions of the Expediting Act, approved February 11, 1903, as amended, and of Section 238(1) of the Judicial Code, as amended, shall be held to apply to any suit in equity arising under Title II of this Act, wherever the United States is complainant."

Section 2 of the *Expediting Act*, approved February 11, 1903, as amended, 32 Stat. 823, 36 Stat. 1167, 15 U. S. C., Sec. 29, 49 U. S. C., Sec. 45, which reads as follows:

> "In every suit in equity brought in any district court of the United States under any of the laws mentioned in the preceding section, wherein the United States

is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

Section 238(1) of the *Judicial Code*, as amended, 36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345(1), which reads as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:
>
> (1) Section 29 of Title 15, and section 45 of Title 49.
>
> . . . . . .

The three conditions set forth in Section 401(d) of the Communications Act of 1934, *supra*, are met in the present case, to wit, it is a suit in equity, it arises under Title II of said Act, and the United States is the Complainant.

The Supreme Court has held that the Expediting Act, approved February 11, 1903, as amended, and Section 238 of the Judicial Code, as amended, provide for direct appeal to the Supreme Court from a District Court:

Ethyl Gasoline Corporation v. *United States* (1940), 309 U. S. 436.

B. The Statute of the United States Involved in the Suit

The validity of a Statute of the United States is not involved, but the suit does involve the interpretation and application of Section 203 of the *Communications Act of 1934*, 48 Stat. 1070, 47 U. S. C., Sec. 203, which reads as follows:

> "(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for

interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communications unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or

(2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense."

C. Dates of Decree and Petition for Appeal

The date of the final decree of the District Court, here sought to be reviewed is June 8, 1944. It reads as follows:

"Order for Permanent Injunction

This cause came on to be heard before the Court on the complaint of plaintiff seeking a permanent injunction, and on the answers of defendants. After a trial held on April 26 and 27, 1944, in which the testimony of witnesses, other evidence, and argument of counsel were presented, the Court found for plaintiff against defendant hotel companies herein, and is this day entering Findings of Fact and Conclusions of Law in support of its judgment.

It appearing that on January 22, 1944, defendant The Chesapeake and Potomac Telephone Company filed with the Federal Communications Commission, as part of its tariff schedules applicable to interstate and for-

eign message toll telephone service, a new tariff regulation, effective February 15, 1944, and which was concurred in by defendant American Telephone and Telegraph Company, providing as follows:

> 'Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club, in addition to the message toll charges of the Telephone Company as set forth in this tariff.'

It further appearing that notwithstanding the provisions of this tariff regulation, and the provisions of Section 203 of the Communications Act of 1934, as amended, defendant hotel companies have since February 15, 1944, continued to collect extra charges, or surcharges, from individuals using telephone private branch exchange extension stations on the premises of defendant hotel companies to make and receive interstate and foreign telephone toll calls, in addition to the regular and effective tariff charges of defendant telephone companies, and the Federal tax, applicable to such calls.

It is, therefore, this 8th day of June, 1944, adjudged, ordered, and decreed, that the defendant hotel companies, and each of them, and all persons acting under the authority or control of each of them, including their officers, agents, servants, and attorneys, be, and they, and each of them, are hereby enjoined and restrained from charging, demanding, collecting, or receiving any charge for and in connection with any interstate or foreign message toll telephone service to or from the premises of defendant hotel companies, other than the message toll telephone charges set forth in the applicable and effective tariff schedules of defendant telephone companies on file with the Federal Communications Commission, and the applicable Federal taxes.

The Court retains jurisdiction over this proceeding in order that it may issue any other injunction against defendants, or any of them, as may appear necessary to effectuate its decision.

By the Court.

(S.) DANIEL W. O'DONOGHUE,
Associate Justice.

Petition for allowance of appeal was presented on August 2, 1944.

D. Substantial Nature of Questions Involved

This is an action in equity instituted under the provisions of Section 401(c) of the Communications Act of 1934, at the request of the Federal Communications Commission, alleging violations by the defendant telephone companies and twenty-seven hotels in the District of Columbia of the provisions of Section 203 of the Communications Act.

The hotels in the District of Columbia, like hotels generally at the present time, provide telephone instruments in hotel rooms so that guests can make and receive calls in their rooms, take and deliver telephone messages for guests, page their guests, and perform other secretarial services. It has been their practice for many years to reimburse themselves for the cost of these services by what are called "service charges" made to guests making telephone calls from their rooms.

In 1942, an investigation of the practices of the telephone companies and the hotels in the District of Columbia was undertaken by the Communications Commission, which by its report and order dated December 10, 1943, found that the services rendered by the hotels were toll telephone communications services subject to the provisions of the Communications Act of 1934 and that any charges therefor should be shown in tariffs filed with it by the telephone companies un-

der the provisions of Section 203 of the Act, or that tariffs should be filed which contained specific provisions with respect to the conditions upon which telephone service would be furnished.

In supposed compliance with the order of the Communications Commission, the telephone companies filed a tariff schedule, which purported to become effective on February 15, 1944, providing as follows:

> "14. *Service Furnished to Hotels, Apartment Houses and Clubs*
>
> Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff."

The hotels thereafter continued to make their charges and the telephone companies continued to furnish toll telephone service to the hotels, whereupon this action was instituted. The section of the Act alleged to be violated is Section 203 requiring common carriers to file tariffs showing their charges and their classifications, practices and regulations affecting such charges and prohibiting them from making other charges or extending to any person any privileges or facilities in communication except as specified in their tariff schedules.

The District Court found that the telephone companies were not violating the Act and should not be enjoined but that the hotels were violating the Act and should be enjoined.

The questions presented include the following:

1. Whether the services rendered by hotels are toll telephone communications services subject to the Communica-

tions Act of 1934, charges for which, if any, must be shown in tariffs filed with the Communications Commission.

2. Whether the Communications Commission has jurisdiction over the charges of hotels for their services of the character involved.

3. Whether, if the services for which the hotels make their charges are hotel services and do not constitute toll telephone communications by a common carrier within the application of the Communications Act of 1934, the telephone companies may make the furnishing of their toll telephone service conditional upon what the hotels charge for their hotel services in the conduct of their hotel business.

4. Whether hotels, which are not common carriers subject to the requirements of the Communications Act of 1934, can be found guilty of a violation of those provisions and whether an injunction may issue against the hotels, when the telephone companies which are carriers subject to the Communications Act, 1934, are found not to be violating the statute and no injunction is issued against them.

There has as yet been little judicial interpretation of the provisions of the Communications Act of 1934 upon which this action rests. The questions presented are questions as to which no controlling precedents have as yet been announced. They are questions of great concern not only to the hotels in the District of Columbia and to the telephone companies operating there, but also to hotels, clubs and apartment houses and the telephone companies throughout the country.

Furthermore, the amounts involved are very substantial, the charges which the hotels have heretofore collected amounting on the average to several thousand dollars annually for each hotel, so that the aggregate amount of the charges for the hotels directly involved in this case, being

the hotels in the District of Columbia, will exceed $100,000 annually and the aggregate amount of the charges of all hotels interested in the questions involved will be many times this figure.

Oral Opinion

A copy of the transcript o ' the oral opinion delivered by the Court in deciding this case is affixed hereto and marked "Exhibit A."

Conclusion

It is thus clear that this appeal is within the exclusive jurisdiction of the Supreme Court and involves the review of substantial errors of the trial Court.

Respectfully submitted,

PARKER MCCOLLESTER,
GEORGE DE FOREST LORD,
Attorneys for Defendant Hotel Companies,
25 Broadway,
New York 4, New York.
JOSEPH W. WYATT,
Attorney for Defendant Hotel Companies,
Southern Building,
Washington 5, D. C.

August 2, 1944.

EXHIBIT A

ORAL OPINION OF THE COURT

Pages 348 to 357
of Transcript

"In the first place the Court holds that the law and the regulations involved in this case, whereby the Federal Communications Commission was established and acts, are lawful and valid.

The Court holds that this Court has jurisdiction of the subject matter of this case and of the parties, and that the Federal Communications Commission likewise had jurisdiction of the matter of the tariff schedules, and so on, that were made governing the two defendant telephone companies and others engaged in the telephone business.

Now that covers the points of law that have been raised here.

The Court holds that any relief along the lines of the tariff schedules, that the hotels here may wish, or that the telephone companies here may wish, should be taken up before the Federal Communications Commission.

Now on the matter of motions to strike out certain testimony, or objections, rather, to the admissibility of certain testimony, the Court rules now that it is not to consider and will not consider in its decision any of the testimony, oral or written, that was offered in this case in regard to a proposed 15 per cent commission to be paid by the telephone companies to the hotels. That was merely an offer. It didn't go so far as to be called an offer of compromise because there is no controversy in regard to money or charges between the telephone companies and the hotels. It may be a businesslike proposition on the part of the telephone companies to try to help the hotels out, because they are mighty good customers of the telephone companies.

But whatever the motive was that prompted it, it wasn't an offer of compromise, and even if it were, the Court shouldn't consider it because it was never carried through; and if it was a generous offer—I doubt whether I could go

so far as to say it was—but if it was a businesslike proposition, or if selfish interests were governing the telephone company, whatever it was, it doesn't bear upon the essential issues of law and fact in this case.

Therefore, the Court is not considering any of the evidence, oral or written, that was introduced here in regard to that proposed payment of 15 per cent of the toll charges to the hotel defendants.

Now there has been testimony offered here to show that what the hotels put on the bills of those guests who used the long distance phones was a reasonable charge for secretarial service or hotel service, or whatever else you wish to call it. Well, the Court will not consider or go into the question of whether it is reasonable or unreasonable, because that isn't an issue in this case. Maybe it is most reasonable, and maybe the hotel guest is very well pleased with the amounts that have been charged for the accommodation and services rendered. But that isn't here before me.

I couldn't undertake to say that the hotels are rendering services worth 15 percent of the charge for long distance calls, and therefore could be able to add that amount to the bills of their guests; I couldn't say that the ten per cent that they are apparently charging is too much or a fair charge, or what. So the Court is going to disregard the testimony concerning the reasonabl-ness of this charge, or surcharge, that the hotels are making to their guests for long distance calls. So that is eliminated from the case.

Now although it may not be required of the Court—because the Federal Communications Commission takes an alternative position—to pass upon the issue as to whether the hotels are agents of the telephone companies, or whether they are to be regarded as subscribers, I think a Court ought to take a stand on that because that is a vital issue in this case.

With all due respect to the plaintiff in this case, the Government, I think they ought to come into Court on a definite theory and not leave the Court to choose, and the plaintiff say, 'Well, take this and if you don't like it, take that and make it the basis of your decision.'

In the opinion of the Court the testimony in this case actually fails to show that these hotels are the agents of the telephone company. There was no written agreement to that effect introduced here; there was no oral agreement to that effect introduced here; and there is no testimony, written or oral, from which this Court could imply the existence of any agency in the hotels on behalf of or as agent of the telephone company.

In the opinion of this Court the hotels are subscribers. They enter into a contract with the telephone company. 'You render us such and such service and we will pay you such and such money'. They get the bill every month or two and they pay the telephone company—that was the evidence in this case—the amount that they owe them as subscribers for telephone service from the telephone company.

Now that being so, the telephone companies have no control whatever over what these hotels are doing in regard to this surcharge. But they have knowledge of it. At least, if they didn't have knowledge of it before this case came up, they have knowledge of it today. As a matter of fact the testimony shows that they have had knowledge of it for some time because they have discussed the matter and endeavored to make some settlement of it.

So the telephone companies are charged with what the hotels are doing in regard to these surcharges they are making on the bills of their guests, for toll or interstate messages.

Now that brings up the question of why we have a Federal Communications Commission. Well, maybe some people wish we didn't have it.

Then the question comes up as to what persons, what property or what purpose this Federal Communications Commission was established for. I take it that without doubt it was established for the benefit of the public, and to protect the public in regard to such matters as those involved in this case. They didn't want to leave the public at the mercy of the telephone companies, having a monopoly, as one witness undertook to say, or maybe I suggested it to him. But any way, monopoly or no monopoly, this Act and these Regulations and these tariff schedules in regard to

telephone messages going out through the states, all have the principal purpose of protecting the public against being overcharged. If we didn't have the Federal Communications Commission, and didn't have the regulations, and didn't have these tariff schedules, the telephone companies could say, if you wanted to talk to John Jones in New York, 'Ten Dollars', or 'Twenty Dollars.' The man calling New York from Washington would say, 'That is too much.' They would say, 'Well, if you think it is too much you can't talk, you can take the train and go up and see him.'

Well, you know such things have been done in the past by corporations, especially by public utilities when they weren't under control.

I have said that because the public are the ones to be primarily protected by this Commission and by the law establishing it, and by the Regulations and Orders that it has made.

If someone who is connected with getting these messages from the person telephoning, to the receiver in New York, the person receiving the message, if somebody else who has some connection or part in transmitting those messages undertakes to slap on an extra charge, whether it is 5 per cent, 10 per cent, 20 per cent, or maybe 50 per cent, or it might even be 100 per cent, just doubling it up, if that were permitted it would be negativing in part, or maybe entirely, the purpose of this Commission and the purpose of this law and of the regulations and orders of this Commission, and the public would not be protected in regard to their interstate telephone messages.

Now, that being so, if someone who has gotten telephone facilities as a subscriber, from the telephone company—and they have gotten those facilities for their own benefit, to accommodate their guests in the hotel—undertakes, when the messages are going through, to render services to the guests, and then undertakes to surcharge and make the charge go above, in amount, the tariff schedule, that would be doing indirectly what the telephone company is not allowed to do, and what the law, by its express and implied terms, and by the regulations of this Commission, and its orders, did not mean to allow.

Now under those circumstances I think that the hotels—it isn't for me to say what they should do—but they could render le s service because they were not getting paid for it, just ' ac you could put dimmer lights in the rooms of a hotel, nstead of 60-watt lights you could put in 40-watt lights— that is up to the individual hotel. They are in competitio n with one another and they can spend as little or as much as they see fit in trying to get guests and patrons and trying to keep them.

So in this case they don't have to render all the service that they do. And if it is too expensive—they all appear to be pretty well organized here—they can all agree to cut down on the expense where they are losing money. They could do that or they could charge for these services separately under some other item, whatever they might wish to call it—secretarial services, accommodation for this or that. Or they could go before the Federal Communications Commission and ask to have an allowance put in the tariff schedule; or they could go to the Rent Commission and because of the action of this Court—if an injunction is granted—could say, 'We should get more rent for our rooms'. Or the hotels could go to the food or the drinks commissions and try to get them to permit a raise in the price of food or drinks.

But that is up to the hotels; they will just have to figure out a way to get the money; and if they can't get it this way they will either have to cut down the service or get it some other way.

Then—of course I needn't suggest it but—if they want to they have the proposition made to them of getting 15 per cent from the telephone company.

As I say, these suggestions I have made are just thoughts, but they don't enter into my decision at all. The hotels have, as I have indicated, a number of possible ways in which they may recoup the losses they say they are sustaining; but the Court isn't concerned with that, that is a worry of the hotels and not of this Court.

Accordingly the Court considers that in this case, while it could enjoin these telephone companies if the facts of the case required, from the facts in this case it appears that

the telephone companies are not violating the tariff sche ules at all, and therefore there is no remedy that shou be granted at this time against the telephone companies fo any acts of their own. Since the Court has held that th hotels are not the agents of the telephone companies, ther fore the telephone companies are not responsible for wh the hotels are doing now.

But the hotels know what they are doing, and the Cou holds that they are responsible for what they are doin and they are making the public pay more for toll charge or for interstate telephone charges than what the Feder Communications Commission has allowed, and therefo they are violating this tariff schedule of the Federal Co munications Commission, they are violating the law, an violating the rules of the Federal Communications Co mission, and should be enjoined accordingly.

So the Court will grant an injunction restraining th hotels from adding these surcharges to the bills of th guests of the hotels, in addition to the regular charges fo the interstate toll charges.

The Court will further reserve, in this case, jurisdictio of it so that should the hotels refuse to obey the order this Court, enjoining them from making these charges, an the telephone companies, knowing that they have mad these charges and that they are still making them, and th by rendering them phone service they will thereby be ai ing and abetting them, and indirectly, maybe; encouragi them to violate the order of this Court and the order the Federal Communications Commission, then the Cou would feel that it would have jurisdiction and authority enjoin the telephone companies by mandatory injunctio or prohibitive injunction, rather, prohibiting them fro rendering any further service to those hotels.

That, I think, covers all the issues in the case.

Counsel can confer together and prepare findings of fac conclusions of law, and a judgment in the case."